It is essential that the Commission continue the practice of allowing parties to attend status conferences by conference call, rather than in person, and the Commission should adopt a rule allowing conference call attendance. The time and expense of traveling across the country for status conferences is overly burdensome and would be contrary to the Commission's goal of expediting the complaint process.

The Commission proposes that "within 24 hours after a status conference, the parties in attendance, unless otherwise directed, must submit a joint proposed order memorializing the oral rulings made during the conference to the Commission." *NPRM*, para. 59. In cases with only two parties, this may be adequate time for this task. But Commission complaint proceedings sometimes have numerous parties. For multi-party proceedings, 24 hours would not be sufficient time to agree on the language memorializing the oral rulings. In multi-party proceedings, the most efficient approach is for the Commission staff to continue to draft the language and circulate it among the parties. If, however, the Commission decides to require parties to have this responsibility in all complaint proceedings, then in multi-party proceedings four days should be allowed, rather than 24 hours.

At the initial status conference, in addition to attempting to settle the matter at that time, the staff and parties should consider setting another date for a full, formal settlement conference. The Commission and parties may find it beneficial to utilize alternative dispute resolution ("ADR") techniques in this process. Of key importance in a formal settlement conference will be the presence of specialists, whether from within the Commission or outside, who have been thoroughly trained in

how to mediate disputes. Properly done, encouraging mediated resolution and settlement of complaints could be the most efficient way to resolve complaints within the deadlines set by Congress.

G. Cease-and-Desist Orders and Other Forms of Interim Relief Require That Burdens Be Placed On The Commission And Complainants (¶¶ 60-62)

The Commission requests comments on the relationship between the Section 312 hearing requirements for a cease and desist order and the Section 274 provision authorizing cease and desist orders. *NPRM*, para. 60. The Section 312 requirements demonstrate Congress's expectations concerning this severe form of sanction which can jeopardize a carrier's ability to conduct its business. Section 312(c) requires the Commission to hold a show cause hearing prior to issuing any cease-and-desist order under the Section, and Section 312(d) places the burden of proceeding with the introduction of evidence and the burden of proof on the Commission. Congress's belief that such standards are just as applicable to Title II as to Title III is evidenced by the reference to Section 312 in Section 224 concerning pole attachments. That Congress did not mention Section 312 in Section 274 or in Section 208 does not indicate that Congress has any less concern with proper due process in those sections, or intends that the protections or burdens would be different in those sections to the extent that the Commission moves toward a cease-and-desist order under them. Congress's language in Section 312, together with the requirements of due process, require that they be the same.

Accordingly, we believe that Congress intended that Section 312-type hearings apply to these Title II Sections if the hearings are used to consider cease-and-desist orders. Consistent with this view, we support the Commission's proposal that a complaint failing to address minimum legal and evidentiary standards "would provide no basis upon which interim relief could be granted." *NPRM*, para. 61. As the Commission explains, courts apply a four factor test that the plaintiff must meet in order to obtain interim injunctive relief, and the posting of a bond. Certainly, no less should be required in carrying out the various Title II provisions.

The Commission points out that, in the *Section 260, 274, 275 NPRM,* the Commission requested comments on the appropriate showing for requests for cease-and-desist orders against LECs with regard to telemessaging, electronic publishing, and alarm monitoring. The Commission states that all comments pertaining to enforcement issues in that rulemaking are incorporated by reference into this proceeding. *NPRM*, para. 62. In our Comments and Reply Comments in that proceeding, we explained the burdens that complainants must meet in order to meet the requirements of the Act and provide defendants with due process.

H. Damages Should Be Bifurcated From Liability (¶¶ 63-69)

Bifurcation Has Been Helpful -- The Commission suggests that meeting Congressional deadlines could be fostered by permitting "the complainant to bifurcate liability and damages issues." *NPRM* para. 63. We agree with this suggestion, so long

as bifurcation leaves a showing of some injury in the liability phase, as discussed below.

The Commission currently has "discretion to conduct bifurcated proceedings, either by bifurcating discovery itself, or by bifurcating [the] action into liability and damages phases."[13] Bifurcation of complaint proceedings has helped avoid wasting substantial time on damages issues in complaints where liability is never found.

Injury Must Be Part Of The Liability Phase -- Bifurcation should be between liability and damages. In this regard, the Commission states "that a significant amount of the parties' discovery efforts often center around developing facts that would prove or disprove injury or damages incurred as a consequence of a violation of the Act or Commission requirements." *NPRM*, para. 64 (emphasis added). The Commission evidently uses the terms "injury" and "damages" interchangeably. Each of these terms, however, has a distinct legal meaning. Injury is an element of many causes of action, and without some injury the complainant often has no standing. Injury is connected to causation of compensatory damages; it is not the damages themselves. A complainant may suffer some injury because of the action of the defendant, and yet there may be no compensatory damages. But the defendant cannot be liable to the complainant for damages unless the defendant's action caused some injury. Unless there is some injury by the defendant to the complainant, there is no reason to go on to the damages phase of the proceeding.

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[13] *1993 Complaint Process Order,* para. 35.

Consistent with these principles, intimately connected to the concept of a violation of the Act is the issue of causation of injury to the complainant. Section 206 of the Act states that carriers are liable for damages in complaint proceedings only to "the person or persons injured thereby." Also, Section 202 requires a complainant alleging discrimination to present a *prima facie* case of injury as a result of asserted rate discrimination.[14] Although Section 208 states that "[n]o complaint shall at any time be dismissed because of the absence of direct damage to the complainant," that language does not affect the requirement that some injury must be shown by the complainant.

Therefore, injury to the complainant must be dealt with in the liability part of the proceeding. Discovery as to causation of some injury should be allowed prior to a finding of a violation, in the first phase of the proceeding. Thus, the Commission should clearly state that the second phase of the proceeding will deal only with the amount of compensatory damages, and that injury or causation issues should be addressed in the liability phase of the proceeding.

Interest-bearing Escrow Accounts For Potential Damages Are Not Currently Needed -- The Commission proposes in "bifurcated proceedings, after a finding of liability, to give the Commission discretion to require defendants to place a sum of money in an interest-bearing escrow account, to cover part or all of the damages for which they may be found liable. This measure would be implemented under standards similar to those used for determining whether a preliminary injunction

[14] *Illinois Bell Telephone Company v. AT&T,* 4 FCC Rcd 5268, para. 10 (1989).

is appropriate, e.g., likelihood of success on the merits, irreparable harm, etc." *NPRM*, para. 69.

We believe that this proposal could create an unnecessary administrative burden on the Commission and parties. We agree that the standards for implementation would have to be strict. In effect, this would create a whole separate proceeding to determine the likelihood of success, the irreparable harm, and the likely amount of damages. We are not aware of a problem in collecting damages from carrier defendants at this time, and unless and until a significant problem arises we believe that the Commission and parties could better spend their resources on the merits of the complaints. In addition, the Commission does not appear to have the authority to require this recovery mechanism for damages. The Commission's sole jurisdiction to award damages is in § 209, "after hearing on a complaint," and that section does not authorize this mechanism.

I. Cross-Complaints and Counterclaims Cannot Be Prematurely Barred (¶¶ 70-71)

The Commission proposes "to allow compulsory counterclaims, those arising out of the same transaction or occurrence that is the subject matter of the opposing party's claim, only if the defendant files them concurrently with the answer." *NPRM*, para. 70. This proposal argues against shortening the time for answers from 30 to 20 days. The defendant needs time to investigate whether or not it has any compulsory counterclaims. Moreover, the Commission should allow the defendant to move to include a compulsory counterclaim after the time of responses to limited self-

executing discovery, if the defendant shows that it could not reasonably have brought the counterclaim at the time of the answer because the necessary information was not in its possession or reasonably known to it. Because of the seriousness of cutting off a party's rights, the Commission should liberally grant these motions.

J. Replies To Oppositions To Motions Should Continue To Be Prohibited (¶¶ 72-73)

The Commission proposes to prohibit replies to oppositions to motions. *NPRM*, para. 73. Rule 1.727(f) is sufficient in this regard and should be retained. It states, "No reply may be filed to an opposition to a motion."

K. New Rules For Motions Would Significantly Expedite The Complaint Process (¶¶ 74-78)

Motions, Especially Those To Dismiss On The Pleadings, Should Be Decided Within A Set Number Of Days -- The Commission states that its "goal is to eliminate unnecessary pleadings that merely delay final resolution, while ensuring that parties have full opportunity to develop their cases and to expedite generally the processing of complaints." *NPRM*, para. 73. We support this goal. One of the best ways to help achieve it would be to adopt a rule that all motions will be decided within 30 days after filing of the opposition, unless unusual circumstances warrant a certain number of additional days. This structure is particularly important with regard to motions to dismiss on the pleadings, including motions to dismiss based on failure to state a claim over which the Commission has authority or based on passage of the

statute of limitations.[15] Current practice often is to decide all motions in the final order on the complaint. Much time and resources could be avoided if motions were ruled upon during the course of the proceeding, particularly if the ruling dismisses the complaint, or claims in it, at an early stage. This process also would decrease the uncertainty of the parties and help them concentrate on what, if anything, is still needed to be done in light of the ruling.

Good Faith Attempts To Resolve Motions to Compel Should Be Required -- The Commission proposes to "require parties filing Motions to Compel to certify that they have made a good faith attempt to resolve the matter before filing the motion." *NPRM*, para. 75. We believe that this requirement would be consistent with the overall need to discourage unnecessary motions and narrow issues.

Five Business Days For Oppositions Should Be Enough If Service Is By Fax -- The Commission proposes "to shorten the deadline for filing oppositions to motions from ten to five business days." *NPRM*, para. 77. We believe that this change would allow enough time so long as service of motions on parties is required by fax, as in the proposed rules. Otherwise ten days would be needed in order to ensure time to receive service by mail and then prepare an opposition.

The Complainant Should Be Prohibited From Introducing New Issues -- The Commission proposes "to prohibit amendment of complaints except for changes necessary under 47 C.F.R. §720(g), which requires that information and supporting authority be current and updated as necessary in a timely manner." *NPRM*, para. 78.

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[15] *See, e.g.*, 47 C.F.R. § 1.728 and Fed.R.Civ.P. 12(b)(6).

We support this proposal. Its adoption is essential in order for the proposed pre-filing activities and form-and-content proposals to be successful in expediting complaints. If the complainant is instead allowed to bring in new issues, then the clock for defendant's responses must start over as well in order to protect due process rights.

L. Confidential or Proprietary Treatment Of Information and Materials Should Be Expanded (¶ 79)

The Commission proposes to revise its rules "to allow parties to designate as proprietary any materials generated in the course of a formal complaint, and not limit such designation to materials produced in response to discovery." *NPRM*, para. 79. We support this proposal. This rule revision is needed because the Commission also proposes to require the submission of much more information with the initial pleadings, and some of this additional information otherwise might have been provided on a confidential basis in response to discovery requests.

M. Rules For Other Submissions Should Be Considered Carefully To Avoid Delay And Protect Parties' Rights (¶¶ 80-83)

Joint Stipulations Of Facts should Not Be Required, And Five Days Often Is Too Short A Time For Joint Stipulations Of Legal Issues -- The Commission proposes "to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed." *NPRM*, para. 80. We oppose any requirement to submit a joint statement of stipulated facts. In our experience, parties will not be able to stipulate to the facts, and the effort of attempting to obtain the

stipulation is a waste of resources that could be better spent in moving the complaint process forward. Concerning joint stipulations of key legal issues, five days is too short a time for complex proceedings involving multiple parties. For instance, in some proceedings there are ten or more parties spread across the country. Ten days should be allowed, and stipulations should be a topic discussed at the status conference.

Briefs Should Always Be Allowed -- The Commission seeks comments "on prohibiting the filing of briefs in cases in which discovery is not conducted. If we were to adopt this option, we would require parties to include proposed findings of fact, conclusions of law and legal analysis with their complaints and answers." The Commission also asks for comments, however, on "whether parties can reasonably prepare proposed findings of fact, conclusions of law and legal analysis before reviewing the response to their pleading and the set of stipulated facts." The Commission "therefore seek[s] comment on whether retention of the briefing process expedites resolving formal complaints." *NPRM*, para. 81.

Briefing of cases should continue as it is currently performed and should be allowed in all complaint proceedings. In the complaint and answer, the parties could not adequately perform the tasks that the Commission proposes. Therefore, without subsequent briefs, the Commission would be required to take on more responsibility for reviewing the total record, thereby delaying the resolution of complaints. The reasons for this are numerous.

First, the complainant cannot adequately "brief" the case in the complaint by including these findings, conclusions, and legal analysis, without having even seen

the answer or stipulated key legal issues and without knowing whether the defendant will undertake discovery.

Second, the defendant also could not adequately brief most cases up front in this manner even with the current 30 days to answer, let alone with the proposed 20 days. Moreover, to adequately brief the case, the defendant must see any response to the answer by the plaintiff (e.g., to affirmative defenses) and the stipulated key legal issues.

Third, the additional information that the Commission proposes to require to be submitted with the pleadings will include information traditionally acquired during discovery. Whether acquired with the pleadings or in subsequent discovery, the parties need time to analyze the information and its relationship to the law. This analysis and corresponding argument is the function of a brief, whereas the function of the complaint and answer are to give notice, frame the issues, and, under the Commission's proposals, to provide supporting information. In CC Docket 92-96, the Commission decided to "permit the submission of briefs in all cases."[16] What the Commission said then is just as applicable now, since discoverable information is likely to be provided up front even when no formal discovery will be conducted. Concerning briefs, the Commission stated:

> These pleadings give parties an opportunity to support their cases by factual evidence gained through discovery and, in turn, provide a full record upon which we can resolve a complaint. We do not have the need or the resources to thoroughly review all discovered materials to ferret out

[16] *1993 Complaint Process Order,* para. 46.

what information may be of decisional significance when briefs summarizing that information may be filed.[17]

Similarly, concerning the information supplied with the complaint and answer, the Commission will not have the need to ferret out what information may be of decisional importance, if the Commission allows parties to fully brief cases. Thus, retention of the briefing process will expedite resolving formal complaints.

The complaint proceeding should be formally deemed submitted upon the filing of the briefs. At that point, the Commission should make an expedited decision on the complaint, within the deadlines set by Congress where those deadlines exist.

Details Concerning Briefs Should Be Discussed In The Status Conference -- The Commission seeks comments on whether the Commission staff should be allowed to limit the scope of the briefs. *NPRM*, para. 81. Parties should not be prohibited from discussing what they believe is important in briefs. It is likely to be impossible for the staff to know for a certainty that something is not important without allowing a party to put it in writing. The staff should be encouraged, however, to inform parties of what issues they believe need briefing. These discussions should take place at the status conference.

The Commission seeks comments "on the appropriate timetables for the submission of any briefs and reply briefs in formal complaint cases" and proposes to "limit initial briefs to 25 pages and reply briefs to 10 pages in all cases." *NPRM*, paras. 82 and 83. The Commission should not try to set strict timetables up-front on a "one

[17] *Id.*

size fits all" basis. Moreover, the Commission's current page limits allow needed flexibility. Cases before the Commission vary significantly in their nature and complexity. Some cases have one issue. In cases with detailed technical or legal issues, however, there can be dozens of issues. Accordingly, strict determinations on timetables and potential reductions in maximum page limits should be made at the status conference for each proceeding.

N. Sanctions Should Be Used To Avoid Frivolous Complaints (¶¶ 84-85)

The Commission points out that its proposed rules which are designed for prompt resolution of complaints will "place greater burdens on complainants and defendants alike to be more diligent in presenting and defending against allegations of misconduct within the meaning of various provisions of the Act." The Commission requests comments on measures to ensure full compliance. *NPRM*, para. 85.

Since the quality of the complaint helps determine the nature of everything else that follows, we believe that strict enforcement of the complaint requirements is particularly essential. Accordingly, we support the Commission's proposal "that a complainant's failure to satisfy the form and content requirements under [the] rules could result in the summary dismissal of the complaint by [the] staff." *NPRM*, para. 85. We agree with the Commission's concern to avoid "frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the Commission or its staff." Id.

O. Other Matters -- The Nature Of Delegated Authority Should Not Change (¶¶ 86-87)

The Commission tentatively concludes "that 'act on' as used in Section 271(d)(6)(B) encompasses, where appropriate, determinations by the Bureau whether a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services and the imposition of any applicable section 271(d)(6)(A) sanction, and need not necessarily be final action by the full Commission." *NPRM*, para. 86.

In applying this section, the Commission should be careful not to change the nature of its delegations to the Bureau. Under the Commission's existing rules, "[t]he Chief, common Carrier Bureau, shall not have authority to designate for hearing any formal complaints which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents or guidelines" and "shall not have authority to impose, reduce or cancel forfeitures pursuant to Section 203 or Section 503(b) of the Communications Act of 1934, as amended, in amounts of more than $80,000."[18] For some time to come, questions of whether a BOC has continued to meet the requirements of §271 will present novel questions of fact, law or policy, and should be decided by the full Commission. This approach also is consistent with Congressional intent for speedy determinations, as evidenced by the 90 day limitation. It would not meet Congressional intent for the Bureau to act within 90 days, only to have potentially lengthy delays in the process for applications for review to the full Commission prior to potential appeals. It would, however, be acceptable for the Commission to delegate

[18] 47 CFR § 0.291(d)&(e).

certain issues to the Bureau for consideration within the 90 day period solely to help the Commission meet the 90 day deadline.

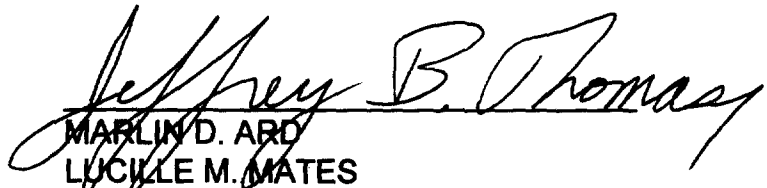
If the Commission allows the Bureau to take any actions in this area, however, those actions should be limited to subsection (i) of § 271(d)(6)(A), which involves issuing "an order to such company to correct the deficiency." If allowed, that action should be limited to orders to correct deficiencies based on established Commission precedent that a deficiency exists, and subject to the BOC's right to apply for review by (and to seek a stay from) the full Commission. It is especially important that the full Commission act directly upon remedies covered by subsections (ii) and (iii), which may "impose a penalty on such company pursuant to title V...or...suspend or revoke such approval." This direct Commission action would be consistent with the current rules, the extreme harm that would be caused by suspension or revocation of a BOC's interLATA authority, and Congress's intent that the Commission act on these complaints quickly.

III. CONCLUSION

The Commission should adopt rules in accordance with our recommendations in order to meet the Commission's goals to facilitate a full and fair resolution of complaints filed under the new statutory complaint provisions within the deadlines established by Congress and to foster robust competition in all telecommunications markets.

Respectively submitted,

PACIFIC TELESIS GROUP



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